

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE MIDDLE DISTRICT OF TENNESSEE
3 NASHVILLE DIVISION

4 UNITED STATES OF AMERICA)
)
5 vs.) No.: 3:10-cr-00009
)
6 JEREMY SETH TUMMINS)
)

8 TRANSCRIPT OF PROCEEDINGS

10 BEFORE: THE HONORABLE WILLIAM J. HAYNES, SENIOR JUDGE
11 DATE: February 9, 2015
12 TIME: 1:06 P.M.

14 APPEARANCES:

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1 FEBRUARY 2, 2015

2 THE COURT: We are here in the United States of America
3 versus Jerry Seth Tummins, and 3:10-cr-9, conference -- pretrial
4 conference.

5 Will counsel identify who is here and on whose behalf?

6 MS. THOMPSON: Yes, your Honor. Jennifer Thompson for
7 Mr. Tummins. I would also ask if my paralegal could sit next to
8 me at counsel table.

9 THE COURT: That is fine.

10 MS. INGRAM: Good afternoon. Lynne Ingram and Carran
11 Daughtrey appearing for the United States.

12 THE COURT: I apologize for the brief delay, but I just
13 got these responses that were filed today a few minutes ago.

14 Let me take up first the defendant's motion. It's a motion
15 in limine, but it seems to me to really involve motions for
16 discovery. Is there any dispute that the images that were
17 seized from the defendant's computer were made available to
18 the --

19 MS. THOMPSON: I'm sorry; I didn't hear what the Court
20 said.

21 THE COURT: Is there any dispute that a disc taken from
22 the defendant's computer with the images at issue were provided
23 to you?

24 MS. THOMPSON: Well, the -- yes. I think that there
25 was a copy that was provided to the expert witness that was a

1 duplicate copy of my client's hard drive that had been cleansed,
2 and that had to remain in the expert witnesses' office.

3 I did -- was provided last week with --

4 THE COURT: Well, wait a minute. Let me back up. Did
5 you get a copy of what the expert has, or the expert has a copy
6 and you get to go look at it?

7 MS. THOMPSON: The expert has the copy of the entire
8 hard drive, and I am allowed to go look at it, per a protective
9 order, through the district court. What I had specifically
10 asked for was, the -- the Government is not going to put in all
11 of that evidence.

12 THE COURT: How many images are we talking about?

13 MS. THOMPSON: I understand there's ten images the
14 Government intends to choose from at trial.

15 THE COURT: Do you have those shown -- have they shown
16 you those ten images?

17 MS. THOMPSON: They showed me a -- yes. They showed me
18 a disc last week. What I wanted to do was confirm on the record
19 that those are in fact the images that the Government intends to
20 use, because there were thousands of pictures.

21 THE COURT: I got that far. But is there -- what
22 reason is there to dispute that that's all the Government is
23 going to introduce? Is there -- are the ten images all of the
24 Government's proof?

25 MS. THOMPSON: I --

1 THE COURT: Well, I'm asking the Government counsel,
2 ma'am.

3 MS. DAUGHTREY: Your Honor, we provided a disc that had
4 the child pornography.

5 THE COURT: Okay.

6 MS. DAUGHTREY: And we're going to choose from those
7 images that are on there. So I think there's some videos as
8 well as images that are on that disc.

9 THE COURT: Okay.

10 MS. THOMPSON: That was --

11 THE COURT: The question was, defense counsel has said
12 they're tentative that you've shown her, that you are going to
13 introduce at trial. Are those the only ten or are there more
14 than that?

15 MS. DAUGHTREY: Your Honor, I don't know exactly how
16 many images are on that disc, but all of the evidence from which
17 the Government will choose to introduce exhibits that are on
18 that disc, videos and images.

19 THE COURT: Yeah, but how many images are there?

20 MS. DAUGHTREY: I don't know. There's about ten, but I
21 couldn't say for sure. But there's not a lot.

22 THE COURT: Yeah, but ten images or 10,000? You made
23 references to video. I mean --

24 MS. DAUGHTREY: Right. There -- there are no more than
25 two dozen videos in the images on that disc.

1 THE COURT: Yeah, but doesn't a video contain numerous
2 images?

3 MS. DAUGHTREY: It -- it -- when you look at the
4 sentencing guidelines, it -- it is considered to contain 75
5 images, but I don't know exactly how many -- I haven't looked at
6 it and counted exactly how many videos versus images. I know
7 it's under 24.

8 THE COURT: Well, I'm going to order the Government by
9 the end of the day to tell the defense, because we're getting
10 close to trial --

11 MS. DAUGHTREY: Yes, your Honor.

12 THE COURT: -- tell them which videos and/or images
13 you're going to introduce. I think it will facilitate the trial
14 of this case. This case is old enough and more than enough time
15 for preparation.

16 MS. DAUGHTREY: Your Honor, unfortunately, I am not
17 going to be able to do that by the end of today, but I could do
18 that by the end of tomorrow. But it's a very small amount
19 that's there. She has reviewed all of it at length last week,
20 so she's familiar with it.

21 THE COURT: Is tomorrow sufficient time?

22 MS. THOMPSON: Yes, your Honor.

23 THE COURT: Okay. Until tomorrow, then. Does that
24 take care of the -- of the images issues?

25 MS. THOMPSON: Yes, your Honor.

1 THE COURT: Okay. Now, the next one, I think that's
2 really the first the one objections were about, what's going to
3 be -- now, does she -- is she able to take these and put them on
4 her own computer or only on a computer provided by the
5 Government?

6 MS. DAUGHTREY: Your Honor, pursuant to 18 U.S.C.
7 3509(m), we're not allowed to give her a copy to take with her.
8 But there is -- just upstairs there is a computer that's
9 available to her that's in a private room which she has been
10 using to review those images and videos.

11 THE COURT: Well, but the issue becomes trial.

12 MS. DAUGHTREY: Yes, your Honor.

13 THE COURT: How to make that service available at
14 trial.

15 MS. DAUGHTREY: That -- that will be available to her.
16 It's just upstairs.

17 THE COURT: I know. But I mean, would -- wouldn't it
18 be helpful to -- was there any objection to allowing defense
19 counsel to share the same computer equipment the Government is
20 going to use to introduce this?

21 MS. DAUGHTREY: Yes. She's welcome to use our
22 computer; yes, your Honor. That's fine.

23 THE COURT: Does that take care of it?

24 MS. THOMPSON: I'm not sure it would, your Honor, the
25 reason being is that if the Government is showing a video on the

1 screen and the witness is testifying regarding the video, I
2 would like an opportunity to have my own video pulled up at
3 counsel table so I can fast-forward to a place that I want to
4 point out in the video.

5 THE COURT: Well, I mean, once they show it, if
6 necessary, we will take a recess so you can reset it to what you
7 want to show.

8 MS. THOMPSON: That will solve the problem, your Honor.
9 Yes.

10 THE COURT: Okay. All right. Well, we've got that
11 resolved.

12 Now, they say they have given you the expert's forensic
13 report and supplemented that report. Is that true?

14 MS. THOMPSON: Yes, your Honor. I have -- I do have a
15 copy of the expert's forensic report.

16 THE COURT: Does that render moot the issues about the
17 expert?

18 MS. THOMPSON: As long as, one, his forensic report was
19 the only report he relied on to develop an opinion. And I still
20 wanted -- I think that today they provided me with a copy of the
21 expert's CV. I wanted an updated CV. And the Government has
22 indicated in its response today that the expert's going to
23 testify as a computer forensic expert. And I just wanted to be
24 clear as to what opinions then the expert would give regarding
25 computer forensics, such as, the expert then is not going to --

1 THE COURT: Usually under our rules, he can't say
2 anything that's not in his report.

3 MS. THOMPSON: Well, his report references things such
4 as these search terms are often used by people when they're
5 searching for child pornography.

6 THE COURT: Why isn't that part of the res gestae of
7 his computer search as to how and why he did it the way he did
8 it?

9 MS. THOMPSON: Well, that would be more, your Honor, as
10 an expert on child pornography, how child pornography is stored.
11 It -- it would be outside the purview of a computer expert who
12 says this file is located in this folder --

13 THE COURT: Well, as I understand it --

14 MS. THOMPSON: -- on this drive.

15 THE COURT: -- his -- his report was prepared based
16 upon his search of the -- of the defendant's computer for the
17 child pornography at issue. So that's an integral part of what
18 he did.

19 MS. THOMPSON: So it would be fine for him to testify
20 that these search terms were used to search LimeWire. I am
21 objecting to him saying this search term, Vicky, is a search
22 term used to find child pornography and that the child
23 pornography Vicky series is a 9-year-old girl who is giving oral
24 sex to her father, because I say that's outside the purview of a
25 computer forensic expert.

1 THE COURT: Well, I mean, isn't it part of the
2 background for how he conducted his search and why he used the
3 search terms he did? As long as he has empirical experience to
4 support that assertion, I don't see what the problem is.

5 MS. THOMPSON: Well, then, I --

6 THE COURT: Are you saying he doesn't have the prior
7 experiences in computer searches for child pornography to give
8 that opinion?

9 MS. THOMPSON: Yes, your Honor. I am saying that he is
10 not going to be an expert in child pornography in and of itself
11 to say this is an image -- this is clearly an image of a
12 12-year-old girl. I look at this video, and I can tell this
13 person in the video is 12. That is not a computer forensic
14 opinion, your Honor.

15 THE COURT: Yeah, but I mean, if it's -- whatever he
16 says, if he has an empirical basis upon which to base it, it
17 would be admissible, wouldn't it?

18 MS. THOMPSON: If he's speaking --

19 THE COURT: If he asserts 25 to 30 or 40 computers with
20 this word and it showed the same victim every time, why wouldn't
21 that be an empirical basis for him to testify to that effect?

22 MS. THOMPSON: Because just because he has seen a file
23 more than once doesn't mean that it was in fact child
24 pornography. There's a second step that goes to seeing a file,
25 and that would be the fact that this person --

1 THE COURT: I mean, it may -- that's why I get back to
2 the res gestae. It's part of the explanation as to why, if you
3 see that file on there, you open it up and see what's there.
4 Isn't that what he is going to say?

5 MS. DAUGHTREY: Your Honor --

6 THE COURT: I haven't seen the report. I mean --

7 MS. DAUGHTREY: Right. It's a 53-page report, and he
8 will be testifying as an expert about what he found and reported
9 in that report.

10 He also was involved in the investigation in an additional
11 way, and he'll be testifying as a fact witness for that. And
12 the information about his -- he'll be testifying that based on
13 his experience -- experience, investigating many of these cases
14 over the years, that he has, for example, determined that this
15 particular search term is used in relation to child pornography.
16 So that would be testimony that he'll make as a fact witness
17 versus what he found on the computer, which would be as an
18 expert. And we will be very clear with the jury to have -- to
19 separate out those two bases on which he is going to testify.

20 MS. THOMPSON: For the record, your Honor, I would
21 state that I believe a computer forensic expert testifies as to
22 what files are on the computer, how they are stored, when they
23 were saved there, when they were accessed, when they were
24 modified, and perhaps where they came from, if they were
25 downloaded from an Internet search.

1 I would state that somebody that's an expert in child
2 pornography would state things like, "This is -- this is child
3 pornography. This person is under 12 in this video. This is a
4 prepubescent teen." And that's not what they're telling me he
5 is going to testify to.

6 I'm not saying that the Government could have him qualified
7 in more than one area, but I want to be clear in advance as to
8 what area they're intending to qualify him to give an opinion on
9 such that I can be ready to cross-examine him in that area.
10 And I think the Government is going to try to expand the opinion
11 that he's going to be giving as to what's on the computer. It's
12 going to be more than file names, access times, how it was
13 saved.

14 THE COURT: I don't think I can really resolve this
15 without seeing the report. And I don't -- I just -- I don't
16 know. I don't really understand your objections. It's helpful
17 to me if you could tie it to more specific portions of the
18 report, that you contend he lacks the adequate basis upon which
19 to express an opinion, if it is in fact an opinion. I just
20 don't know.

21 What day is trial set for? I've forgotten.

22 MS. DAUGHTREY: Your Honor, I do have --

23 MS. THOMPSON: The 4th.

24 MS. DAUGHTREY: I'm sorry.

25 THE COURT: I'm going to give the -- when was the

1 supplementation provided to defense counsel?

2 MS. THOMPSON: Today. The CV, things like that, today.

3 MS. DAUGHTREY: No. The -- the curriculum vitae, I
4 believe, was provided on January the 29th. I did provide
5 another copy today. The actual forensic reports have been
6 provided years ago, your Honor.

7 THE COURT: Yeah. But wasn't there a representation
8 about supplementation of a report?

9 MS. DAUGHTREY: There was a supplemental report that
10 has been provided, some -- I don't know exactly when it was
11 provided, but it's been -- it's been weeks, months, years ago
12 that that's been provided.

13 THE COURT: Well, it kind of makes a difference as to
14 whether the supplementation was a year ago or a week ago.

15 MS. DAUGHTREY: Your Honor, my understanding is, it was
16 provided in discovery. I believe it may have been 2011 or 2012.
17 I didn't --

18 THE COURT: I got -- I got that on the first report.
19 The question is, in the supplementation of the report -- when
20 was the supplemental report provided?

21 MS. DAUGHTREY: The -- the original report was provided
22 in 2010. I believe the supplement was either in 2011 or 2012.
23 I'm sorry; I don't have the file here, and I wasn't the attorney
24 at the time. So I apologize; I can't answer that question.

25 It has been a long time, your Honor. I think it was

1 provided prior to Ms. Thompson actually representing
2 Mr. Tummins.

3 THE COURT: Okay. I'm going to give you until a week
4 from today to identify any specific portions of the forensic
5 expert's report that you contend do not qualify as expert -- or
6 do not qualify as admissible expert testimony. I -- I don't
7 think it's helpful to discuss these issues in a vacuum. I think
8 we need more specific factual context in which to evaluate this.

9 All right. We have the images, experts to be resolved,
10 really. I think the last category concerning images are really
11 which images are going to be shown. I think that's going to be
12 resolved by tomorrow.

13 MS. THOMPSON: Yes.

14 THE COURT: I don't know what the other evidence is.
15 The Government says it's going to identify what it's going to
16 introduce into proof, and I think that would make the motion in
17 limine on that issue moot, the defense motion in limine.

18 Now, are there any other issues that we have not covered
19 that the defense feels it needs to address?

20 MS. THOMPSON: For the record, your Honor, I had
21 objected to the Government having a witness testify as to, like,
22 this picture is from the Vicky series --

23 THE COURT: Well, I mean --

24 MS. THOMPSON: -- and they answered that in their
25 response I have just received.

1 THE COURT: I'm -- I'm telling you, I can't resolve
2 that by looking at the report. Yes, the reporting has got to
3 lay out the factual basis for anything that he says. If it is
4 inadequate, you can identify what it is about it that's
5 inadequate, and I'll look at it and I'll decide it. I don't
6 think I can decide that in a vacuum.

7 MS. THOMPSON: Yes. Very good, your Honor. I believe
8 those are all my concerns, your Honor. That's -- those are all
9 my issues from my motion in limine.

10 THE COURT: Now, the Government's motion concerns
11 this concern about possible testimony against the expert. I'm
12 going to follow Judge Campbell's approach and, before any
13 defense -- when the defense intends to elicit anything that
14 might remotely touch on this, we're going to have an out-of-jury
15 hearing to see what it is. I agree with Judge Campbell that
16 there's got to be a factual basis for the question.

17 MS. DAUGHTREY: Thank you, your Honor.

18 THE COURT: Does that resolve the Government's concern?

19 MS. DAUGHTREY: Yes, it absolutely does. Thank you.

20 THE COURT: I'm going to ask counsel if you-all, before
21 we leave today, will pick up Exhibits Stickers from -- from
22 Mr. Zager. Please put your exhibit sticker on the back page of
23 the document. If the document has writing on it, please staple
24 it to the back page of the document. I use exhibit stickers
25 with more detailed information about the case. Put the exhibit

1 stickers on the back. It facilitates the finding of the exhibit
2 during the course of the trial.

3 If you're at a point where you know you're going to be using
4 the screen, please let me know, and we can make sure that the
5 screen is up and running and we don't have any down time waiting
6 for the camera to go on.

7 For voir dire, I will voir dire, let counsel voir dire. I
8 do not want voir dire questions touching on the merits of the
9 case. I will ask questions relating to the jury panel
10 concerning any issues with prior experience or exposure to
11 child -- what is called child pornography, and I will explore --
12 I will explore that. But I don't want any voir dire questions
13 that are a vehicle for basically putting factual issues in the
14 case before the jury.

15 We'll have our six and ten jury strikes. We'll have --
16 after voir dire by me, and counsel will have a bench conference,
17 have challenges for cause, that will be six strikes for the
18 Government, ten strikes for the defense. After that, we'll have
19 a bench conference to identify any -- any challenges to the
20 exercise of peremptory challenges.

21 If there's any -- if any side -- either side intends to use
22 a visual in the opening statement, I want it shown to the other
23 side ahead of time, and we can take it up. I don't want visual
24 evidence going before the jury about which is a factual dispute
25 on admissibility.

1 I generally limit opening statements to 15 minutes. If the
2 image is going to be narrowed, I think 15 minutes should
3 probably be enough for each side. If you -- if you don't think
4 15 minutes is enough, let me hear from you.

5 MS. DAUGHTREY: I think 15 minutes should be plenty,
6 your Honor.

7 MS. THOMPSON: That's fine, your Honor.

8 THE COURT: Okay. As you-all -- as you may know. If
9 you try a case before me, we start at 9, we go an hour and a
10 half. Once the jury is selected, we'll go hour-and-a-half
11 sessions. We may go a little bit later to accommodate a
12 particular witness. We'll usually end up around 5 or 5:30, but
13 once again, we may go a little bit longer, if necessary, to
14 finish up a witness.

15 We will have a jury instruction conference toward the end of
16 the trial. I try and get as many -- as much of the evidence
17 before we have the jury instruction conference. If you have any
18 special jury requests, you can file them, but we won't take them
19 up until toward the end of -- very end of the trial.

20 Are there any other matters, any questions anybody has about
21 trial procedures?

22 MS. DAUGHTREY: Not about trial procedures, your Honor.

23 MS. THOMPSON: No, your Honor.

24 THE COURT: Okay. Any other questions?

25 MS. DAUGHTREY: Your Honor, I just would like to make

1 sure it's on the record that Mr. Tummins received an offer from
2 the Government on January the 30th. It was by letter to his
3 attorney. I just would like to verify that he received it and
4 that he has chosen to turn that offer down and go to trial.

5 THE COURT: Well --

6 MS. DAUGHTREY: I'm referring to the Lafler Supreme
7 Court case when I make that request, your Honor.

8 THE COURT: Well, I would expect, if there's going to
9 be any acceptance of the offer -- it hasn't been ten days yet.
10 But I expect that if it was going to be an acceptance of that
11 offer, it would be sufficiently in advance of trial that we
12 don't incur the expense of having to send for the jury.

13 When do the jury notices go out, Jeff?

14 THE COURTROOM DEPUTY: I don't know.

15 THE COURT: Why don't we find out when the jury notice
16 go out? We'll take a brief recess.

17 (Recess.)

18 THE COURT: My understanding is that the jury summons
19 has already gone out, but that would include for all the judges
20 who have trials, so I don't know that it is exclusively for this
21 Court. But I do think that it would be necessary to make a
22 reasonable period of time to evaluate an offer. If it were made
23 on the 30th, I would expect by the end of the week, we would
24 expect bringing some response.

25 MS. THOMPSON: Yes, your Honor.

1 THE COURT: Has the decision been made already?

2 MS. THOMPSON: Yes, your Honor. He had turned down --
3 we've got a written offer letter, and I reviewed it with my
4 client and his family. And he has officially turned down the
5 offer.

6 THE COURT: Well, the issue is moot. Any other matters
7 to decide?

8 We usually summon -- I forgot about this. We usually summon
9 -- we're going to summon 42 jurors. They will be seated seven
10 to a row beginning with the second row. You-all will move your
11 furniture around this way, so you'll be facing them. There will
12 be 21 on this side, 21 on that side. You will get a seating
13 chart to assist you in identifying the jurors as they are
14 seated. And when we do the peremptory challenges, I prefer to
15 have the challenge done by seat number in the courtroom as
16 opposed to jury number. And there will be a seat number
17 assigned to each juror, so I think it will be easy to follow.

18 Any other matters, either side?

19 MS. DAUGHTREY: No, your Honor.

20 THE COURT: All right. We're adjourned.

21 (Whereupon, at 10:16 a.m., the foregoing proceedings were
22 adjourned.)

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REPORTER'S CERTIFICATE

I, Brian V. Ratekin, Notary Public for the State of Tennessee and Court Reporter, do hereby certify:

That I reported on the stenograph machine the proceedings held in open court on February 9, 2015; in the matter of United States of America vs. Tummins, Case No. 3:10-cr-00009; that said proceedings in connection with the trial were reduced to typewritten form by me; and that the foregoing transcript is a true and accurate record of said proceedings.

This the 18th day of February, 2015.

S/ Brian V. Ratekin

BRIAN V. RATEKIN
Registered Professional Reporter
Certified Court Reporter